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No. 74-1331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

CITY OF PHILADELPHIA, ET AL.,
Petitioners

v.

GEORGE P. BAKER, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS, ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR, TRUSTEES OF PENN CENTRAL TRANSPORTATION COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Trustees of Penn Central Transportation Company respectfully pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit, *City of Philadelphia v. Baker* is reported at 508 F.2d 279 and is reproduced as Appendix A to the petition (App. 1a-14a).

QUESTIONS PRESENTED

1. Was the Court of Appeals right in deciding that a designation by the Secretary of Transportation, pursuant to Section 202 of the Rail Passenger Service Act (RPSA), that a train is in intercity service is not reviewable in any court?

2. Do petitioners have the right to challenge discontinuance of trains by the Penn Central Trustees pursuant to RPSA when that Act (Section 307(a)) provides that only the Attorney General of the United States is authorized to challenge such discontinuances?

STATUTES INVOLVED

In addition to the statutes referred to in the Petition, Section 307(a) of the RPSA is also pertinent. That section provides:

> (a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this Act, obstructs or refuses, fails, or neglects to discharge its duties and responsibilities under this Act, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall upon petition of the Attorney General of the United States, or in any case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

STATEMENT OF THE CASE

The joint Petition of the City of Philadelphia, Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission and United Transportation Union asks this Court to review train discontinuances by the Penn Central Trustees (Trustees) pursuant to RPSA. The Reorganization Court, by its order No. 238, entered on April 27, 1971, authorized the Trustees to enter into a contract with the National Railroad Passenger Corporation (Amtrak). *In re Penn Central Transportation Company*, 329 F. Supp. 477 (E.D. Pa. 1971). Having entered into a contract with Amtrak under Section 401(a)(1) of RPSA, the Trustees were required to give notice of their intention, on their own behalf, to discontinue all intercity rail passenger service both in accordance with the contract and under Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. §13a(1).

Included in the Trustees' notice of discontinuance were all trains which had been designated by the Secretary of Transportation to be included in Amtrak's basic intercity rail passenger system.

Several persons including the petitioners here, asked the Reorganization Court to find that the Trustees had violated RPSA in attempting to discontinue a group of trains which it was alleged were commuter rather than intercity in nature.

After consideration of that petition, the Reorganization Court on April 30, 1971 by its Order No. 244 required the petitioners to submit their claims to the Interstate Commerce Commission so that the Court would be advised as to whether in the Commission's opinion, the 200 series trains between New York and Philadelphia and the 600 series trains between Harrisburg and Philadelphia, Pa.—which are the subject of the Petition for Certiorari to this

Court—were operated in intercity rail passenger service within the meaning of RSPA. The Commission in *Penn Central Transportation Company—Status of Passenger Service (Harrisburg-Philadelphia, Pennsylvania)*, 338 I.C.C. 621 (1971) and *Penn Central Transportation Company—Status of Passenger Service (Philadelphia, Pa.-New York, N.Y.)*, 338 I.C.C. 690 (1971), concluded that the trains were not in intercity rail passenger service within the meaning of RSPA.

Petitioners thereafter moved the Reorganization Court to convene a three-Judge District Court to enforce the orders of the Commission. The Trustees and Amtrak moved to dismiss the complaints. The Reorganization Court granted the motions to dismiss and the United States Court of Appeals for the Third Circuit, without dissent, affirmed the orders of the Reorganization Court. The Court of Appeals held that the Secretary of Transportation in his report to the Congress pursuant to Section 201 of the RPSA, had designated both the 600 series trains between Philadelphia and Harrisburg, and the New York-Philadelphia 200 series trains as intercity. The Court further found that the Congress, by Section 202 of the RPSA, had intended that the report of the Secretary was to be subject to review only by the Congress and not by the courts.

The Court of Appeals concluded that it was unnecessary to consider the contention that *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) barred relief.

REASONS FOR NOT GRANTING THE WRIT

I. The Decision of the Court of Appeals Involves No Important or Recurring Question of Law

There is no reason for this Court to review the decision of the Court of Appeals since it deals with a statutory interpretation involving a unique factual situation which will not surface in the future. All of the issues raised by the petitioners here relate to preliminary procedures which were established so that there would be an orderly reduction in intercity rail passenger service and the establishment of a national rail passenger system by Amtrak. The report of the Secretary of Transportation on the intercity rail passenger system to be operated by Amtrak was released about January 28, 1971.

There were a few Court challenges of this legislation and the changes in passenger train service under it. All of the litigation involving the discontinuance of service by railroads, except this Petition, has been concluded. Therefore, petitioners cannot establish that the Court's granting of this petition would affect any existing or future litigation.

The decision of the Court of Appeals is not in conflict with any decisions of this Court nor with any decision in another Circuit. None of the cases referred to by petitioners involved a determination of the Secretary of Transportation pursuant to Section 201 of the RPSA. The issue before the Court of Appeals was unique and local and not involved in any of the other cases.

The petitioners' contention that the decision of the Court of Appeals usurps the primary jurisdiction of the Interstate Commerce Commission is without merit. One of the Commission proceedings referred to involved a discontinuance of commuter service pursuant to Section 13(a)

of the Interstate Commerce Act, 49 U.S.C. § 13(a) and did not concern the RPSA at all. *See Penn Central Transp. Co. Discon. or Change in Serv.*, 338 I.C.C. 318 (1971).

The other proceedings before the Commission were the result of referrals by District Courts for advisory opinions and were not based upon the Commission's exclusive primary jurisdiction. *See Chicago & E.I.R.R. Discontinuance of Trains*, 338 I.C.C. 714 (1971); *Kennedy v. Baltimore & O.R.R.*, 342 I.C.C. 19 (1972), 342 I.C.C. 778 (1973); *Penn Central Transp. Co.—Status of Passenger Service*, 338 I.C.C. 660 (1971); *Penn Central Transp. Co.—Status of Passenger Service (Phila., Pa.-Harrisburg, Pa.)*, 338 I.C.C. 621 (1971); and *Penn Central Transp. Co.—Status of Passenger Service (Phila., Pa.-New York, N.Y.)*, 338 I.C.C. 690 (1971).

Petitioners have argued that the Court of Appeals has misconstrued Section 202 of RPSA. Under this Section the Secretary of Transportation was to prepare a report and recommendations for the basic system of intercity rail passenger service. The trains which are the subject of this Petition were all identified as intercity trains in the final report submitted to Congress by the Secretary on January 28, 1971. The Secretary in establishing the points between which intercity passenger trains shall be operated was required by Section 201 of the RPSA to ". . . indentify all routes over which service may be provided, and the trains presently operated over such routes . . .". In Part II of his final report the Secretary listed all of the 200 series trains as being operated over a portion of the New York-Washington segment of the basic Amtrak system. Since this Basic System was designated by the Secretary in accordance with Sections 201 and 202 of the RPSA, it was limited to intercity passenger service, and therefore, only included intercity passenger trains. None of the local

trains service between New York City and points in New Jersey and none of the commuter train service running between Trenton, New Jersey and Philadelphia, Pennsylvania, which is operated over this same Washington to New York line and on the same tracks is listed in the Secretary's Report.

A similar procedure was followed by the Secretary in establishing the New York-Chicago and New York-Kansas City routes. In identifying intercity trains operating over these lines the Secretary included each of the 600 series trains operating between Philadelphia and Harrisburg. But the Philadelphia commutation service operating between Trenton and Philadelphia and between Paoli, Pennsylvania, and Philadelphia was not included in the Report.

Since the trains involved in this appeal were designated as intercity passenger trains by the Secretary, the Trustees were required to discontinue their operation by RPSA. Further, having entered into a contract with Amtrak pursuant to Section 401(a)(1) of the RPSA, the Trustees were prohibited from competing with Amtrak by Section 401(c) of that Act. Thus, the Trustees, by the Amtrak agreement, were required to discontinue all of the 200 and 600 series trains operating over the lines of railroad on which Amtrak began providing service on May 1, 1971.

The Court of Appeals was right in concluding that the final report of the Secretary is not reviewable in any court. The Congress' intent as evidenced in RPSA was that only the Congress should review the basic system and that judicial review was precluded.

II. The Trustees Discontinuance of Passenger Service Did Not Violate Petitioners' Rights

Petitioners have contended that their States Rights are being violated by the decision of the Court of Appeals.

Their purpose is to circumvent the decision of this Court in *National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers,* 414 U.S. 453 (1974). There it was held that Section 307(a) of RPSA authorized only the Attorney General of the United States to maintain an action against a railroad for non-compliance with the Act.

Although the Court of Appeals did not reach the issue of Petitioners standing to maintain their action, it is plain that the suit was not authorized by Section 307(a) of the RPSA and is contrary to the Decision of this Court in *National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers.*

Since the trains in question were discontinued in accordance with the provisions of the RPSA, Section 307(a), this Court's ruling prohibits Petitioners or any other private parties from challenging such discontinuance.

The decision below is not inconsistent with this Court's decision and therefore, there is no justification for granting the Writ.

CONCLUSION

It is respectfully submitted that Petitioners have failed to establish that the Court of Appeals erred in its consideration of the provision of the Rail Passenger Service Act, or that any important recurring issue of law is involved. Therefore, the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Certificate of Service

Pursuant to Rule 33 of the United States, copies of the Brief of Respondents, Trustees of Penn Central Transportation Company, in Opposition to Petition for Writ of Certiorari have been sent this 22nd day of May, 1975, by United States mail, postage prepaid, to counsel listed below.

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